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9 UNITED STATES DISTRICT COURT  
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
11 WESTERN DIVISION  
12

13 CAROL BROWN, ) No. CV 08-3095-R(MANx)  
14 Plaintiff, )  
15 v. ) Date: November 30, 2009  
16 JOHN E. POTTER, ) Time: 10:00 a.m.  
POSTMASTER GENERAL, )  
17 Defendant. ) Hon. Manuel L. Real  
18 ) United States District Judge

19  
20 SEPARATE STATEMENT OF UNCONTROVERTED FACTS  
21 AND CONCLUSIONS OF LAW RE:  
22 DEFENDANT'S MOTION FOR SUMMARY JUDGMENT  
23 OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT<sup>1</sup>  
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27 <sup>1</sup> Defendant submits this Revised Separate Statement, in  
28 compliance with the Court's November 30, 2009 Order at the  
hearing on Defendant's Motion.

1 After consideration of the papers in support of and in  
2 opposition to Defendant's Motion for Summary Judgment or, in the  
3 Alternative, Partial Summary Judgment, the Court determines that  
4 the following facts have been established as,

5  
6 UNCONTROVERTED FACTS

- 7 1. Plaintiff Carol Brown ("Brown") filed this action for  
8 alleged employment discrimination under the Rehabilitation  
9 Act of 1973 and Title VII of the Civil Rights Act of 1964,  
10 as amended, based on (1) multiple injuries she sustained  
11 while employed as a clerical worker for the Postal Service,  
12 (2) her race (African-American), and (3) her gender.
- 13 2. Defendant John E. Potter, Postmaster General ("Defendant"),  
14 now moves for summary judgment or, in the alternative,  
15 partial summary judgment. The Court grants Defendant's  
16 motion in its entirety.
- 17 3. Brown was hired by the USPS as a Mark-Up Clerk on March 1,  
18 1986. (SAC ¶¶ 1, 48; Solis Dec. ¶ 2)
- 19 4. She was assigned to the Marina Del Rey Mail Processing  
20 Center ("Marina station"), where she remained for the next  
21 nineteen years. (SAC ¶¶ 1, 48; Solis Dec. ¶ 2)
- 22 5. While at the Marina Station, Brown felt that she was  
23 harassed by two of the managers at the Marina Station.
- 24 6. At some point in 1989, Brown injured her lower back while at  
25 work. (SAC ¶ 48; Solis Dec. ¶ 2)
- 26 7. Two years later, on October 31, 1992, Brown sustained

1 another injury at work. (Solis Dec. ¶ 2)

2 8. This time, she re-injured her lower back and she also

3 injured her right knee. (SAC ¶ 48; Solis Dec. ¶ 2)

4 9. Brown filed a workers' compensation claim in connection with

5 the second set of injuries. (Solis Dec. ¶ 2)

6 10. On or about November 4, 1992, the U.S. Department of Labor

7 ("DOL") accepted her workers' compensation claim. (Id.)

8 11. Beginning in or about 1993, Brown received reasonable

9 accommodations for her injuries while at the Marina Station.

10 (SAC ¶ 49; Solis Dec. ¶ 3)

11 12. Specifically, she was placed on limited duty and was

12 provided a lower lumbar support chair. (Id.)

13 13. In or about 1996, Brown was diagnosed with diabetes and high

14 blood pressure. (SAC ¶ 48; Solis Dec. ¶ 4)

15 14. In or about 1999 or 2000, Brown developed bilateral carpal

16 tunnel syndrome. (Id.)

17 15. Despite her multiple injuries and other medical issues,

18 Brown continued to perform her clerical duties, with

19 accommodation, until the closure of the Marina Station in

20 the first week of July 2005. (SAC ¶ 49; Solis Dec. ¶ 5)

21 16. Because the Marina Station was closing, Brown and the other

22 employees who worked at that facility faced job eliminations

23 or transfers to other Postal facilities. (Solis Dec. ¶ 5)

24 17. Brown was transferred to the Bellflower Post Office, a

25 location she herself selected. (SAC ¶ 1; Solis Dec. ¶ 5)

26 18. Brown selected that particular location, in order to reduce

27

1 the stress of the commute. (Id.)

2 19. On or about June 24, 2005, before the Marina Station closed  
3 and while she was facing transfer to Bellflower, Brown  
4 secured a medical evaluation with orthopedic physician Dr.  
5 Jeffrey Colbert. (Solis Dec. ¶ 6)

6 20. Dr. Colbert diagnosed Brown with chronic lumbar strain,  
7 right knee strain, and obesity. (Id.)

8 21. Brown's clerical duties at her new position in Bellflower  
9 required frequent, continuous use of her back, hands, and  
10 legs. (Solis Dec. ¶ 7)

11 22. A window clerk position generally required the employee to  
12 sit or stand at a customer service window for eight hours a  
13 day. (Id.)

14 23. Postal clerks typically worked long shifts performing  
15 customer service functions; other clerks were required to  
16 spend hours handling large volumes of mail, from business-  
17 sized envelopes to large packages. (Id.)

18 24. Brown's medical issues, however, required limitations on  
19 what she could and could not do. (Id.)

20 25. Dr. Colbert provided Brown with multiple substantial work  
21 restrictions, including: continuous sitting up to one hour,  
22 continuous standing up to one hour, continuous walking up to  
23 fifteen minutes, no climbing or kneeling, and continuous  
24 bending/stooping up to thirty minutes. (Id.)

25 26. Dr. Colbert also wrote Brown a prescription for a chair with  
26 lumbar support and no wheels. (Id.)

1 27. Brown started her new position at the Bellflower Post Office  
2 on July 8 or 9, 2005. (SAC ¶ 55; Kuang Dec. ¶ 2)

3 28. She was assigned to work as a Sales, Services  
4 (Window)/Distribution Clerk. (Kuang Dec. ¶ 2)

5 29. When Brown reported for duty, she provided management her  
6 medical restrictions. (Id.)

7 30. Brown claims that, prior to her arrival, the Postmaster at  
8 Bellflower expressed reservations about having Brown on  
9 staff, given her multiple physical conditions. Despite his  
10 reservations, however, the transfer took place. (Solis Dec.  
11 ¶ 9)

12 31. Brown began her new assignment without incident. (Kuang  
13 Dec. ¶ 3)

14 32. Within the first few weeks, however, Brown voiced  
15 complaints about working outside her medical restrictions.  
16 (SAC ¶¶ 56, 57; Solis Dec. ¶ 3)

17 33. She requested, among other accommodations, that management:  
18 (1) provide her a chair with lower lumbar support; (2) limit  
19 her work to activities within her physical restrictions; and  
20 (3) allow her to alternate between sitting one hour and  
21 standing one hour at a time. (SAC ¶ 58; Kuang Dec. ¶ 3)

22 34. Management permitted Brown to use her supervisor's chair to  
23 use while doing her desk work. (Kuang Dec. ¶ 4)

24 35. In addition, management purchased a special chair from a  
25 catalog called Lab Safety specifically so that Brown could  
26 work the retail counter comfortably. (Id.)

1 36. The chair that was purchased for Brown to use at the window  
2 was adjustable in height, offered back support, and came  
3 with a foot rest that swivelled, though there is some  
4 question as to whether the back qualified as official  
5 "lumbar support." (Id.)

6 37. In addition to the two chairs that Brown was provided,  
7 management allowed Brown to alternate one hour of desk work  
8 and one hour of window work. (Kuang Dec. ¶ 5) When working  
9 the window, Brown was allowed to sit and assist customers of  
10 her choosing; she was told that she need only perform those  
11 transactions that would not exceed her work restrictions.  
12 (Id.)

13 38. Brown asked that her second day off be changed so that she  
14 would have two consecutive days off, rather than one day off  
15 at a time. (Id.)

16 39. At first, Brown said that the two consecutive days off could  
17 either be Saturday and Sunday or Sunday and Monday. (Id.)

18 40. Management told Brown that they could not give her Mondays  
19 off because of the high volume of window customers on that  
20 day. (Id.)

21 41. Brown complained that the chair she had been given to use at  
22 the window was inadequate. (SAC ¶ 11; Kuang Dec. ¶ 7)

23 42. She said that she wanted a chair similar to the one she had  
24 used at the Marina station. (Kuang Dec. ¶ 2)

25 43. Further, Brown demanded to have input on what chair would be  
26 purchased for her. (Kuang Dec. ¶ 7)

1 44. Management requested information from Brown, such as the  
2 store from which the Marina chair had been purchased and the  
3 serial number of the chair. (Id.)

4 45. On or about October 19, 2005, Brown renewed her complaints  
5 about being worked outside her medical restrictions. (Solis  
6 Dec. ¶ 15)

7 46. Supervisor Kuang did not understand why Brown was still  
8 complaining, because he had scheduled her to alternate  
9 between performing window work and desk work, one hour at a  
10 time. (Id.)

11 47. Management agreed to allow Brown to process second notices  
12 for certified mail that customers needed to pick up, as well  
13 as certificates of delivery. (Solis Dec. ¶ 16; Kuang Dec. ¶  
14 10)

15 48. The remainder of the workday would be filled by work as  
16 needed. (Solis Dec. ¶ 16; Kuang Dec. ¶ 11)

17 49. Typically, Brown would be assigned to sell money orders and  
18 stamps. (Kuang Dec. ¶ 13)

19 50. Several months into the start of her employment at  
20 Bellflower, Brown provided Kuang information about the chair  
21 she wanted purchased for her. Specifically, she gave Kuang  
22 the name of a furniture store. Kuang determined that the  
23 store was no longer doing business at the location Brown  
24 gave him. (Id.)

25 51. Kuang endeavored to find Brown a chair to serve as a  
26 suitable replacement for the chair that had already been  
27

1 purchased for her. (Id.)

2 52. In the meantime, Brown objected to writing and throwing  
3 certified letters and flats. (SAC ¶ 62; Solis Dec. ¶ 19)

4 53. She also objected to selling money orders and stamps. (Id.)

5 54. She felt that those duties exceeded her work restrictions in  
6 that they required her to work the window for two-hour  
7 stretches and type repetitively without proper back support,  
8 even though the chair that had been purchased for her  
9 contained back support. (Id.)

10 55. She returned to her physician for further assistance. (SAC  
11 ¶¶ 9, 11; Solis Dec. ¶ 19)

12 56. In or about February 2006, Brown gave management a written  
13 medical restriction in which her physician advised that  
14 Brown needed to have two consecutive days off. (SAC ¶¶ 9,  
15 11; Kuang Dec. ¶ 14)

16 57. Her physician claimed that Brown's health was failing under  
17 the current arrangements and that she needed an extended  
18 period of recovery time before commencing a new work week.  
19 (Id.)

20 58. When management failed immediately to act upon this  
21 particular demand, Brown commenced an extended leave of  
22 absence, which lasted from March 18, 2006 to May 8, 2006.  
23 (SAC ¶ 9; Kuang Dec. ¶ 14)

24 59. When Brown returned to work on or about May 19, 2006, she  
25 presented to management another note from her doctor. (SAC  
26 ¶ 9)



1 60. As before, her doctor asked that Brown be given two  
2 consecutive days of rest. (Id.)

3 61. Management granted Brown's request for two consecutive days  
4 off. (SAC ¶¶ 9, 11; Kuang Dec. ¶ 15)

5 62. Management notified Brown that effective June 3, 2006, her  
6 two consecutive days off would be Saturday and Sunday. (SAC  
7 ¶ 9; Kuang Dec. ¶ 15)

8 63. Even though management accommodated her request for  
9 consecutive days off, Brown remained displeased. (SAC ¶ 9,  
10 11; Kuang Dec. ¶ 18)

11 64. Brown claimed that she needed her consecutive days off to be  
12 Sunday and Monday instead of Saturday and Sunday, so she  
13 could use Mondays to schedule medical appointments, as she  
14 had done in the past. (SAC ¶ 9, 11; Kuang Dec. ¶ 16)

15 65. She requested a meeting with management. (Id.)

16 66. The meeting took place on or about June 7, 2006. (SAC ¶¶ 9,  
17 64; Kuang Dec. ¶ 17)

18 67. Brown asked to be given her preferred schedule. (Id.)

19 68. Management wished to stick to their decision and attempted  
20 to explain why. (SAC ¶ 9; Kuang Dec. ¶ 17)

21 69. Management advised Brown that Monday is normally the busiest  
22 day for the retail window, and that on Saturday the Post  
23 Office was only open for half a day. (Kuang Dec. ¶ 17)

24 70. Management further advised Brown that it had no problem with  
25 approving time off for her medical appointments on Mondays.  
26 (SAC ¶ 9; Kuang Dec. ¶ 17)

1 71. Brown was upset that management declined to her request for  
2 Mondays off. (Kuang Dec. ¶ 18)

3 72. The meeting left Brown with an additional concern. During  
4 their meeting, Brown learned information from which she  
5 concluded that management had maintained a file of her  
6 medical records, which she felt violated a workplace policy.  
7 (SAC ¶ 64)

8 73. On June 19, 2006, Brown contacted an EEO counselor in order  
9 to pursue an EEO complaint against management for alleged  
10 disability discrimination. (SAC ¶¶ 1, 8)

11 74. Although the triggering event was the meeting of June 7,  
12 2006, Brown complained of events dating back to July 8,  
13 2005, at about the time of her initial transfer to  
14 Bellflower. (SAC ¶¶ 8, 11)

15 75. Brown also complained to the EEO counselor that management  
16 was keeping a file containing her medical records. (SAC ¶  
17 12)

18 76. On June 21, 2006, after learning of Brown's EEO complaint,  
19 Supervisor Kuang gave Brown catalogs of chairs and asked  
20 that she select a chair that met her particular needs. (SAC  
21 ¶ 11; Kuang Dec. ¶ 19)

22 77. Brown objected that the catalogs were too heavy for her to  
23 use. (SAC ¶ 66; Kuang Dec. ¶ 19)

24 78. The following week, Kuang asked Brown if her doctor had  
25 recommended a chair yet. (Kuang Dec. ¶ 20)

26 79. Brown responded that he had not. (Id.)  
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1 80. She then commenced a second extended leave of absence. (SAC  
2 ¶ 11; Kuang Dec. ¶ 21)

3 81. This time, her leave lasted approximately six months, from  
4 July 5, 2006 to January 22, 2007. (Id.)

5 82. On August 17, 2006, approximately five weeks after she  
6 commenced this second extended leave, Brown was examined by  
7 Dr. William Simpson. (Solis Dec. ¶ 30)

8 83. Dr. Simpson diagnosed Brown with having bilateral carpal  
9 tunnel syndrome and impingement syndrome bilateral  
10 shoulders. (Id.)

11 84. On August 25, 2006, Brown filed a formal EEO complaint,  
12 alleging disability and race discrimination, as well as  
13 retaliation and harassment. (SAC ¶ 11; Solis Dec. ¶ 31)  
14 Brown's basic complaint was that the Postal Service failed,  
15 in numerous respects, to abide by her medical restrictions.  
16 (SAC ¶ 11; Solis Dec. ¶ 31) She also complained that being  
17 required to look through heavy catalogs for chairs  
18 aggravated her carpal tunnel syndrome. (SAC ¶ 12; Solis  
19 Dec. ¶ 31)

20 85. When Brown returned to work at Bellflower in January 2007,  
21 she brought with her a multitude of additional work  
22 restrictions based on Dr. Simpson's diagnoses, including:  
23 intermittent lifting up to ten pounds; continuous sitting up  
24 to fours hours and intermittent sitting up to eight hours;  
25 intermittent standing up to one hour; intermittent walking  
26 up to four hours; no climbing, kneeling, bending, stooping,  
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1 twisting, pulling or pushing; intermittent simple grasping  
2 up to eight hours; intermittent fine manipulation up to one  
3 hour; no reaching above the shoulder; intermittent driving  
4 up to two hours; and no operating machinery. (Kuang Dec. ¶  
5 22)

6 86. In light of her myriad new restrictions, management met with  
7 Brown and the Vice President of her union to ascertain  
8 precisely what job functions she was able at that time to  
9 perform. (SAC ¶ 69; Kuang Dec. ¶ 23)

10 87. During the meeting, the Postmaster expressed the view that,  
11 given the collective magnitude of restrictions, there was  
12 nothing for Brown to do in his office. (SAC ¶ 67; Kuang  
13 Dec. ¶ 23)

14 88. Following the meeting, Brown was taken off the window and  
15 given desk work only. (Kuang Dec. ¶ 24)

16 89. On January 22 or 23, 2007, management provide Brown a third  
17 chair. (SAC ¶ 68; Kuang Dec. ¶ 24)

18 90. Brown found this chair to be acceptable. (SAC ¶ 68; Kuang  
19 Dec. ¶ 24)

20 91. She was also given a back brace. (Id.)

21 92. Seeking to comply with Brown's new restrictions, Supervisor  
22 Kuang had the chair's wheels replaced with bell glides the  
23 following day. (Kuang Dec. ¶ 24)

24 93. On January 26, 2007, Brown provided management with a  
25 prescription for a chair with lumbar support **and** wheels.  
26 (Kuang Dec. ¶ 25)  
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1 94. In addition to provide the new prescription, Brown informed  
2 management that she could not do various specific tasks.

3 (Id.)

4 95. As such, the list of available work for Brown to perform at  
5 the Bellflower Post Office was severely curtailed, to the  
6 point where she was only called upon to process second  
7 notices for certified mail that customers needed to pick up.

8 (Id.)

9 96. The Bellflower Post Office did not have eight hours of such  
10 work a day, and a funded position did not exist in the USPS  
11 to perform just this task. (Id.)

12 97. When Brown was informed that there was no longer any  
13 meaningful work for her at Bellflower, she became  
14 temporarily disabled. (Kuang Dec. ¶ 26)

15 98. Her temporary disability lasted for a two-month period, from  
16 March 8, 2007 to May 1, 2007. (Id.)

17 99. On March 19, 2007, while Brown was off-work on temporary  
18 disability, Candy Palencia, Supervisor, Customer Service,  
19 nominated Brown for reasonable accommodation consideration  
20 by the Postal Service's District Reasonable Accommodation  
21 Committee ("DRAC"). (Solis Dec. ¶ 37)

22 100. The purpose of nominating her was to determine if there was  
23 productive work that Brown could have been offered. (Id.)

24 101. Brown declined to participate, however, in the DRAC process.  
25 (Id.)

26 102. Management then conducted a search to find suitable work for  
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1 her within a fifty-mile radius. (Id.)

2 103. Work was located at the Postal facility in Santa Ana. (Id.)

3 Brown was then slated for transfer to the Santa Ana  
4 facility, where she would be assigned to work a voice  
5 recognition machine in the CFS Unit. (Id.)

6 104. On June 12, 2007, after she returned to work and discovered  
7 that she had been reassigned to Santa Ana, Brown made a  
8 second contact with an EEO counselor in order to alleged  
9 further acts of discrimination and retaliation. (SAC ¶¶ 1,  
10 18, 19; Solis Dec. ¶ 38)

11 105. Brown objected to being reassigned to Santa Ana. (SAC ¶ 1)

12 106. She complained about the increased commute and the change in  
13 her hours to an early morning shift. (SAC ¶¶ 1, 21)

14 107. She also complained that there were positions available at  
15 the Bellflower facility that she could perform with  
16 reasonable accommodations. (SAC ¶ 1)

17 108. On August 16, 2007, Brown filed a second formal EEO  
18 complaint, in which she alleged not only disability  
19 discrimination, but also gender discrimination, race  
20 discrimination, and retaliation for her prior EEO activity.  
21 (SAC ¶ 21)

22 109. In her second EEO complaint, Brown claimed that the transfer  
23 to Santa Ana amounted to a denial of reasonable  
24 accommodations. (SAC ¶ 22)

25 110. Brown admitted that other disabled employees had been  
26 reasonably accommodated at Bellflower. (SAC ¶ 21)

1 111. She claimed, however, that the employees who received  
2 accommodations were not African-American. (Id.)

3 112. On January 16, 2008, while at Santa Ana, Brown initiated EEO  
4 contact that led to the filing of a third EEO complaint, in  
5 connection with being denied a change of work schedule on  
6 December 24 and 31, 2007. (SAC ¶¶ 2, 25, 28; Fuentes Dec. ¶  
7 2)

8 113. Brown objected to having to work her normal shift on  
9 Christmas Eve and New Year's Eve. (SAC ¶ 28; Fuentes Dec. ¶  
10 2)

11 114. She claimed that everyone but her was given the option of  
12 changing the shift on those days or taking those days off.  
13 (Id.)

14 115. On February 7 and 27, 2008, the Postal Service issued final  
15 agency decisions respectively dismissing Brown's first two  
16 EEO complaints. (SAC ¶ 17)

17 116. On or about March 27, 2008, approximately nine months after  
18 starting her new position in Santa Ana, Brown learned that  
19 her work schedule would again change. (Hoang Dec. ¶ 2)

20 117. Instead of from 6:00 p.m. to 2:30 p.m., her new shift would  
21 run from 2:00 p.m. to 10:30 p.m.; and instead of having the  
22 consecutive days of Saturday and Sunday off, she would have  
23 the non-consecutive days of Sunday and Tuesday off. (SAC ¶¶  
24 32, 70; Hoang Dec. ¶ 2)

25 118. Brown objected to the change in work schedule. (SAC ¶ 32)

26 119. Two weeks before Brown learned of the change, management had  
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1        advised staff that whatever schedules they had been given  
2        before being assigned to the CFS Unit would be honored.

3        (SAC ¶¶ 32, 72; Hoang Dec. ¶ 3)

4        120. Brown concluded, therefore, that the change of her work  
5        schedule violated management's prior representations. (SAC  
6        ¶ 32; Hoang Dec. ¶ 3)

7        121. On April 11, 2008, Brown provided management a copy of her  
8        work restrictions requiring consecutive days off. (SAC ¶¶  
9        32, 74; Hoang Dec. ¶ 4)

10       122. Management advised Brown that the work restrictions would  
11       have to be forwarded to the Office of Injury Compensation  
12       for approval, which it was. (SAC ¶¶ 32, 74; Hoang Dec. ¶ 4)

13       123. Although Brown only worked one or two shifts under the  
14       changed schedule, Brown felt that Santa Ana management  
15       should have forwarded her work restrictions to the Office of  
16       Injury Compensation before changing her work schedule. (SAC  
17       ¶ 32; Hoang Dec. ¶ 4)

18       124. She further believed that the failure to forward the  
19       paperwork prior to implementing the change amounted to  
20       retaliation. (SAC ¶ 32)

21       125. On April 14, 2008, Brown sought another round of EEO  
22       counseling, which led to her filing a fourth EEO complaint,  
23       this time in connection with an alleged failure to observe  
24       her physician's requirement that she been given two  
25       consecutive days off. (SAC ¶¶ 2, 32)

26       126. On May 12, 2008, Brown filed this action.  
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1 127. Brown's re-assignment to Santa Ana came to an end, and she  
2 was transferred back to Bellflower. (Hoang Dec. ¶ 5)

3 128. Brown's last day in Santa Ana was Friday, May 23, 2008.  
4 (Id.)

5 129. On May 30, 2008, Brown signed her acceptance a limited duty  
6 job offer as a Window/Distribution Associate at the  
7 Bellflower Post Office. (Kuang Dec. ¶ 27)

8 130. Her work hours were from 8:00 a.m. to 5:00 p.m., with  
9 Saturday and Sunday off. (SAC ¶ 39; Kuang Dec. ¶ 27)

10 131. On May 28, 2008, Brown reported for work in Bellflower.  
11 (Kuang Dec. ¶ 27)

12 132. Management assigned some of her duties to other employees.  
13 (SAC ¶ 39; Kuang Dec. ¶ 27)

14 133. Specifically, on July 17, 2008 through July 29, 2008, Brown  
15 received work instructions from a carrier supervisor rather  
16 than from her direct supervisor (Kuang), and other employees  
17 did work that Brown was tasked with performing, including:  
18 working the window, working UBBM and POS express mail, and  
19 throwing letters in the P.O. Box section. (SAC ¶¶ 39, 86,  
20 88; Kuang Dec. ¶ 28)

21 134. For example, on July 21, 2008, Brown threw mail for an hour  
22 in the P.O. Box section, after which time she was instructed  
23 by a temporary carrier supervisor to throw mail in that  
24 section only when another employee was not present to do it.  
25 (SAC ¶¶ 39, 89; Kuang Dec. ¶ 28) On July 24, 2008, Brown  
26 worked the P.O. Box section when another employee failed to  
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1 report to work. (SAC ¶ 90; Kuang Dec. ¶ 28) However, on  
2 September 15, 2008, Brown did not work the P.O. Box section,  
3 even though other employees were unavailable. (SAC ¶ 91;  
4 Kuang Dec. ¶ 28)

5 135. Brown claims that, during this time period, she sat in a  
6 room by herself with no work to perform, while other  
7 employees -- including part-time flexibles -- performed  
8 Brown's duties. (SAC ¶¶ 39, 87, 93; Kuang Dec. ¶ 29)

9 136. She further claims that she was the only employee at the  
10 Bellflower office who was given no work to perform. (SAC ¶  
11 39; Kuang Dec. ¶ 29)

12 137. She says that she felt "isolated and segregated." (SAC ¶  
13 39)

14 138. During this time period, she claims, she clocked in as "non-  
15 productive." (SAC ¶ 39)

16 139. On August 14, 2008, Brown made initial contact with an EEO  
17 counselor regarding issues that eventually formed the basis  
18 for a fifth formal EEO complaint, which she filed on October  
19 23, 2008. (SAC ¶¶ 38, 40)

20 140. She believed that unilaterally changing her shift from  
21 August 11 to August 14, 2008 violated her medical  
22 restrictions. (SAC ¶ 75)

23 141. The Postal Service issued final agency decisions on Brown's  
24 third and fourth EEO complaints, which Brown received on  
25 August 28, 2008. (SAC ¶ 37)

26 142. On September 17, 2008, Brown was given yet another job  
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1 offer. (SAC ¶ 94; Kuang Dec. ¶ 31)

2 143. The offer excluded window and POS duties, limited her bulk  
3 mail or "UBBM" duties, and increased her "stand-by" time  
4 from 1 to 8 hours. (Id.)

5 144. Brown objected to the offer. (SAC ¶ 94)

6 145. On September 25, 2008, Brown contacted EEO for yet  
7 additional counseling. (SAC ¶ 41)

8 146. She alleged that the agency denied her the opportunity to  
9 perform her duties, despite the availability of work, after  
10 she returned to Bellflower. (SAC ¶ 42)

11 147. She claimed that she was excluded from window and POS duties  
12 and was given limited UBBM duties. (Id.)

13 148. She further claimed that her "stand-by" time was increased  
14 from 1 to 8 hours. (Id.)

15 149. She further claimed that she was forced to clock in as non-  
16 productive. (Id.)

17 150. Finally, she claimed that she was being set-up for a  
18 determination that the Postal Service had no work available  
19 for her to perform -- a precursor to termination. (Id.)

20 151. On January 22, 2009, Brown filed a Second Amended Complaint  
21 ("SAC") in this action.

22 152. The SAC incorporated the newly dismissed fifth and sixth  
23 complaints. The fifth and sixth EEO contacts were  
24 consolidated into one complaint, which the agency dismissed  
25 on December 4, 2008. (SAC ¶¶ 43, 45)

26 153. In summary, the Court finds that, while Brown was employed  
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1 at the Marina Office, the Postal managers gave her an  
2 ergonomic chair; when she transferred to Bellflower, they  
3 purchased two more chairs for her use (both of those chairs  
4 had back support), and they allowed her to use her  
5 supervisor's chair when doing desk work; they further abided  
6 by her physician's restrictions by modifying her assignments  
7 so that she would have diminished duties that would not  
8 require unduly repetitive hand and arm motion; once she  
9 provided appropriate medical documentation, they gave her  
10 consecutive days off; when all those efforts did not meet  
11 her needs, they transferred her to Santa Ana so that she  
12 could perform her duties by means of a voice activated  
13 computer; and, finally, when the Santa Ana position came to  
14 an end, they offered her desk work only, which she refused.  
15 They took her off the active rolls only after all else  
16 failed.

17 154. Brown remains a Postal employee and presently collecting  
18 untaxed OWCP benefits.

19  
20 Based on the foregoing Uncontroverted Facts, the Court now  
21 makes its,

22 CONCLUSIONS OF LAW

23 1. The Rehabilitation Act of 1973 requires federal agencies,  
24 including the USPS, to provide reasonable accommodation to  
25 the known physical or mental limitations of an otherwise  
26 qualified applicant or employee with a disability, unless to  
27

1 do so would cause the employer undue hardship. 29 C.F.R. §  
2 1630.9. Section 504 of the Rehabilitation Act provides that  
3 "no otherwise qualified individual with a disability . . .  
4 shall, solely by reason of her or his disability, be  
5 excluded from the participation in, be denied the benefits  
6 of, or be subjected to discrimination under any program of  
7 activity receiving federal financial assistance." 29 U.S.C.  
8 § 794(a).

9 2. Title II of the Americans with Disabilities Act ("ADA")  
10 provides identical protection against disability  
11 discrimination in employment. See 42 U.S.C. § 12132. The  
12 ADA requires its provisions to be interpreted in a way that  
13 "prevents imposition of inconsistent or conflicting  
14 standards for the same requirements" under the  
15 Rehabilitation Act. See 42 U.S.C.A § 12117(b) (West Supp.  
16 2000); Wong v. Regents of University of California, 410 F.3d  
17 1052, 1055 n.1 (9<sup>th</sup> Cir. 2005).

18 3. The term "disability" is defined as "(A) a physical or  
19 mental impairment that substantially limits one or more of  
20 the major life activities of [the] individual; (B) a record  
21 of such an impairment; or (C) being regarded as having such  
22 an impairment." 42 U.S.C. § 12102(2). Under the applicable  
23 federal regulations, major life activities include functions  
24 "such as caring for oneself, performing manual tasks,  
25 walking, seeing, hearing, speaking, breathing, learning, and  
26 working." 29 C.F.R. § 1630.2(I); 29 C.F.R. § 1630.2(I).

1 4. On September 25, 2008, Congress passed the ADA Amendments  
2 Act of 2008, which rejected the Supreme Court's  
3 interpretation of the term "disability" in Sutton v. United  
4 Air Lines, Inc., 527 U.S. 471, 119 S.Ct. 2139, 144 L.Ed.2d  
5 450 (1999) and Toyota Motor Manufacturing Kentucky, Inc. v.  
6 Williams, 534 U.S. 184, 122 S.Ct. 681, 151 L.Ed.2d 615  
7 (2002). The amendments expanded the class of individuals  
8 who are entitled to protection under the ADA.

9 5. The Court finds that there is a triable issue of fact  
10 regarding whether any or all of Brown's physical conditions  
11 actually substantially limited a major life activity. The  
12 issue, therefore, becomes whether Brown was otherwise  
13 qualified for her position.

14 6. An otherwise qualified individual with a disability is one  
15 who (a) has an impairment which substantially limits one or  
16 more major life activities; (b) has a record of such  
17 impairment; or (c) is regarded as having such an impairment,  
18 and can perform the essential functions of her position,  
19 with or without a reasonable accommodation. 29 C.F.R. §  
20 1630.2(m).

21 7. Essential functions are "fundamental job duties of the  
22 employment position . . . not including the marginal  
23 functions of the position." Bates v. United Parcel  
24 Services, Inc., 511 F.3d 974, 988 (9<sup>th</sup> Cir. 2007) (quoting  
25 29 C.F.R. § 1630.2(n)(1)). In assessing a position's  
26 essential functions, "consideration shall be given to the  
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1 employer's judgment as to what functions of a job are  
2 essential." 42 U.S.C. § 12111(8).

3 8. The Court finds that, as a matter of law, Brown's physical  
4 restrictions disqualified her for the clerical position she  
5 held.

6 9. Brown's window clerk position required frequent and  
7 continuous use of her back, hands, and legs. Her position  
8 generally required her to work at a customer service window  
9 for eight hours a day. Although Brown disputes that she had  
10 to stand at the window, she does not dispute that the  
11 customer service position typically required the handling of  
12 large volumes of mail, some of which involved lifting large  
13 packages.

14 10. Moreover, it was contingent upon Brown to identify a  
15 reasonable accommodation that would have enabled her to  
16 perform those essential functions. See Zukle v. Regents of  
17 Univ. Of Calif., 166 F.3d 1041, 1046 (9<sup>th</sup> Cir. 1999);  
18 Haysman v. Food Lion, Inc., 893 F.Supp. 1092, 1102 (S.D.Ga.  
19 1995). Brown offered no evidence in this regard and,  
20 consequently, has failed to meet her burden.

21 11. Indeed, the undisputed evidence presented to this Court  
22 shows that, even when Brown was given limited-duty  
23 positions, she could not meet the essential requirements  
24 without risking further injury, and this was true even after  
25 she received numerous additional accommodations. The Postal  
26 Service had no obligation under the Rehab Act to create an  
27

1 entirely new job for her. See Wellington v. Lyon County  
2 School District, 187 F.3d 1150, 1155-56 (9<sup>th</sup> Cir. 1999).

3 Nor did the Postal Service have a duty to continue creating  
4 limited-duty positions, particularly after its initial  
5 endeavors to keep Brown safely and productively employed  
6 proved unsuccessful. See Taylor v. Garrett, 820 F.Supp.  
7 933, 938 n.9 (E.D. Pa. 1993).

8 12. FECA requires employers to allow injured employees to return  
9 to their old positions or, if they can no longer perform  
10 their original duties, to offer them reasonable alternative  
11 positions. 5 U.S.C. § 8151(b); 20 C.F.R. § 10.505; see also  
12 Meester v. Runyon, 149 F.3d 855, 856 (9<sup>th</sup> Cir. 1998), *cert.*  
13 *denied*, 526 U.S. 1144 (1999). Brown does not assert a  
14 violation under FECA, nor could she sustain such a claim,  
15 since limited-duty positions were created for her.

16 13. The Court further finds that Brown was reasonably  
17 accommodated following a series of good-faith meetings and  
18 other interactions, even though she was not a qualified  
19 employee entitled to reasonable accommodations.

20 14. It is an unlawful employment practice for an employer to  
21 fail to engage in a timely, good faith, interactive process  
22 with an employee to determine reasonable accommodations for  
23 known disabilities. See Barnett v. U.S. Air, Inc., 228 F.3d  
24 1105, 1114 (9<sup>th</sup> Cir. 2000), *cert. granted in part on other*  
25 *grounds*, 532 U.S. 970 (2001). Reasonable accommodations are  
26 mechanisms to remove barriers or provide assistance to  
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1 disabled individuals so that they can perform the essential  
2 functions of their jobs. Cripe v. City of San Jose, 261  
3 F.3d 877, 889 (9<sup>th</sup> Cir. 2001). However, employers are not  
4 required to waive or reallocate essential functions. 29  
5 C.F.R. Pt. 1630 App. § 16340.2(o).

6 15. Brown has presented no evidence from which a trier of fact  
7 reasonably could conclude that the Postal managers failed to  
8 engage in the interactive process with her or, after  
9 engaging in the interaction process, failed to give her  
10 reasonable accommodations. Brown's declaration merely sets  
11 forth a series of unsupported statements characterizing her  
12 managers as unkind. She states, for example: "[i]nstead of  
13 talking with me about my physical condition and what  
14 accommodations I needed, management just pushed me out to  
15 training and, when I returned, had me perform all the duties  
16 of a Window Clerk with no accommodation." (Brown Dec. ¶ 19)  
17 Statements such as these are inadmissible under Fed.R.Evid.  
18 602, 611(a), 103(c), 404-405, and 701.

19 16. Even if such statements were admissible, they would fall  
20 short of raising a triable issue. After Brown initial  
21 workers' compensation claim was accepted by DOL, the Postal  
22 Service placed her on limited duty and gave her a chair with  
23 back support. When she transferred to her window clerk  
24 position in Bellflower in July 2005, the Postal managers did  
25 not "sit back passively" and "offer nothing." Taylor v.  
26 Phoenixville School District, 184 F.3d 296, 312 (3d Cir.

1 1999). They were proactive and gave Brown a supervisor's  
2 chair to use while performing desk work. (Brown Depo. 54:1-  
3 55:9) They then purchased for her use at the window an  
4 adjustable chair with back support and foot rest. (Brown  
5 Depo. 54:21-25, 206:21-207:10 & Exh. 602)

6 17. Brown disputes that she was given a supervisor's chair to  
7 use while doing desk work and also that a chair was  
8 purchased for and given to her. (See Brown Dec. ¶ 18) At  
9 her deposition, however, Brown conceded that she took her  
10 supervisor's chair and he never insisted that she give it  
11 back. (Brown Depo. 54:1-55:9) She also testified that a  
12 chair, which she referred to as a "stool" was purchased for  
13 her. (Brown Depo. 54:21-25, 206:21-207:10 & Exh. 602) She  
14 even identified the chair in a photograph, which clearly  
15 showed that offered back support. (Brown Depo. 206:21-  
16 207:10 & Exh. 602) Under the Ninth Circuit's "sham"  
17 affidavit rule, "a party cannot create an issue of fact by  
18 an affidavit contradicting his [or her] prior deposition  
19 testimony." Kennedy v. Allied Mut. Inc. Co., 952 F.2d 262,  
20 266 (9<sup>th</sup> Cir. 1991).

21 18. The provision of accommodations continued. When Brown  
22 complained that the window chair was inadequate, the Postal  
23 managers did not ignore her. They requested information,  
24 more than once, so that they could investigate a new  
25 purchase for her. When the Postal managers did not receive  
26 the information requested, they took steps on their own to  
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1 find a suitable chair, sought specific input from Brown on  
2 June 21, 2006, purchased the chair, and then presented it to  
3 her (along with a back brace) in January 2007 after she  
4 returned from her second extended leave of absence.

5 19. Although the Postal managers at first resisted giving Brown  
6 two consecutive days off, it is undisputed that her initial  
7 request was not accompanied by a physician's certification  
8 that she needed that accommodation for health reasons. When  
9 she presented a physician's medical restriction in or about  
10 February 2006 supporting her request for consecutive days  
11 off, the Postal managers took the matter under advisement  
12 and, when Brown returned to work on May 19, 2006, they  
13 granted her request, effectively June 3, 2006.

14 20. Brown's insistence upon determining the particular days she  
15 would be given had no objective medical basis and,  
16 therefore, is irrelevant to the questions of whether the  
17 accommodation offered was reasonable or not.

18 21. The undisputed facts show that, from the beginning of her  
19 tenure at Bellflower, the Postal managers allowed Brown to  
20 sit or stand for one-hour stretches, according to her needs.  
21 She was permitted to assist customers of her choosing and  
22 was told not to perform transactions that exceeded her  
23 limitations. She has presented no evidence whatsoever  
24 supporting her claim that she was forced to stand or sit any  
25 longer than she was able. If she chose to sit or stand for  
26 longer periods than comfortable or perform duties that  
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1 unduly taxed her physical conditions, the Postal managers  
2 could not have been reasonably expected to intervene each  
3 time in order to prevent her from doing so.

4 22. Indeed, the undisputed facts show that, throughout her  
5 employment, the Postal managers did what they could to  
6 accommodate Brown by changing and decreasing the work they  
7 expected her to perform. For example, they assigned her to  
8 process second notices for certified mail, as well as  
9 certificates of delivery. These assignments did not require  
10 the same level of continuous, customer-service interactions  
11 that the window position required. The Postal managers also  
12 relieved Brown of performing any work, except as needed to  
13 sell money orders and stamps, in order to ensure that she  
14 was not being overtaxed.

15 23. Brown's response to these good-faith efforts was to lodge  
16 additional complaints, claiming, for example, that she was  
17 being required to remain at the window for longer than an  
18 hour. Dr. Colbert had not restricted Brown, however, from  
19 doing any work altogether for periods that exceeded one  
20 hour; he merely restricted Brown from standing or sitting  
21 for stretches exceeding one hour without breaks. There is  
22 no evidence that any Postal manager ever insisted that Brown  
23 chose between either to sitting or standing, without break,  
24 while she sold the money orders or stamps.

25 24. In any event, Brown's window job was essentially a desk job  
26 that did not require any appreciable walking, climbing,  
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1 kneeling, or driving; nor did her position require that she  
2 bend or stoop continuously. Consequently, Brown could not  
3 have been called upon to perform any of these activities,  
4 which she claimed would have placed a strain on her.<sup>2</sup> Dr.  
5 Simpson's August 2006 restrictions placed strict limitations  
6 on what duties Brown could perform with her hands. But,  
7 this fact is equally unavailing to Brown; because the  
8 undisputed evidence shows that the Postal managers  
9 endeavored, after meeting with Brown and her union  
10 representatives, to honor those restrictions by giving her  
11 desk work only.

12 25. When it appeared that the Bellflower Post Office did not  
13 have enough work to keep Brown productively employed, given  
14 her medical restrictions, the Postal managers did not  
15 immediately terminate her. They nominated her for  
16 consideration by the District Reasonable Accommodation  
17 Committee ("DRAC"), the purpose of which was to find her  
18 suitable work. It is undisputed that Brown declined to  
19 participate. Still, the Postal managers did not terminate  
20 her. Instead, they found her a position in Santa Ana, where  
21 she would be assigned to work a voice recognition machine,  
22 relieving her of all duties requiring use of her hands.<sup>3</sup>

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23  
24 <sup>2</sup> Similarly, Dr. Colbert's initial prescription did not  
25 preclude any lifting restrictions, nor did it restrict Brown's  
26 hand usage. Any job functions that involved lifting, typing or  
writing, therefore, could not have been unreasonable at the time.

27 <sup>3</sup> Postmaster Puskas's January 26, 2007 letter to  
28 Contractor-Nurse Case Manager Nancy Lemus, which Brown attaches

1 Even this assignment, which placed no physical burdens on  
2 her whatsoever, Brown managed to find unacceptable because  
3 of the commute. (Brown Dec. ¶ 29)

4 26. Returning to Bellflower, Brown made yet additional  
5 complaints, this time based on the Postal managers' alleged  
6 failure to give her work that she claimed she could do. The  
7 period during which other employees were allegedly given  
8 this work lasted, however, only twelve days, from July 17 to  
9 July 29, 2008. Moreover, even then, the Postal managers  
10 endeavored to accommodate Brown. They responded with yet  
11 another job offer. This limited duty job offer -- which  
12 excluded all duties that required Brown to work the window,  
13 *i.e.*, the very duties that Brown repeatedly insisted  
14 exceeded her restrictions -- was presented on September 17,  
15 2008, and Brown rejected the offer.

16 27. Brown does not dispute that these efforts at accommodating  
17 her actually took place. She merely denies or downplays  
18 their significance, choosing instead to emphasize growing  
19 frustrations exhibited by some unspecified managers:

20 28. "No representative of Defendant ever even talked to me about  
21 my condition and what it would take to allow me to work  
22 within my restrictions. Instead, Defendants constantly  
23 yelled and/or spoke to me in a harsh tone of voice about how  
24 they did not have enough work for me to do with all of my

25  
26 to her declaration, amply expresses the frustration he  
27 experienced in trying to find suitable work for Brown. (Brown  
28 Dec. ¶ 23 & Exh. E)

1 restrictions." (Brown Dec. ¶ 25) Again, these and similar  
2 statements contained in Brown's declaration are  
3 objectionable on multiple grounds; they lack foundation  
4 (Fed.R.Evid. 602), are argumentative (Fed.R.Evid. 611(a),  
5 assert an improper characterization (Fed.R.Evid. 103(c),  
6 404-405), and express lay opinion (Fed.R.Evid. 701).

7 29. The record is replete, in any event, with examples of the  
8 numerous efforts the Postal managers made throughout the  
9 years to engage Brown and her doctors in a productive  
10 exchange of information. (See, e.g., Brown Depo. 151-52,  
11 153-68, 172-76, 187-91, 199-200, 208-20, 223-26, 233-34,  
12 238-42 & Exhs. 518, 522, 525, 527, 529, 532, 534, 535, 539,  
13 542, 545, 546, 555, 558, 561, 567, 569, 571, 572, 575, 594,  
14 595, 599, 604, 605, 607, 610, 618, 620, 621, 622, 623, 624,  
15 626, 628, 632, 633, 634, 644, 648, 673, 683, 691, 692)

16 30. Brown dismisses these actions *in toto*, claiming that they  
17 did not help her but rather resulted in exacerbating her  
18 conditions. (Brown Dec. ¶ 19) However, the accommodations  
19 management offered were within her restrictions, and she  
20 does not claim otherwise. Moreover, Brown fails to  
21 establish causation between the alleged denial of reasonable  
22 accommodations and the alleged deterioration of her  
23 impairments, since for much of her time at Bellflower, she  
24 took extended leaves of absence. That Brown remained  
25 dissatisfied, despite the assistance she was provided, is  
26 irrelevant to the question of whether diligent, good-faith  
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1 efforts were made to reasonably accommodate her. See Kimbro  
2 v. Atl. Richfield Co., 889 F.2d 869, 879 n.10 (9<sup>th</sup> Cir.  
3 1989), *cert. denied*, 498 U.S. 814 (1990).

4 31. Finally, there is no evidence that Brown received inferior  
5 treatment to non-disabled employees because of her physical  
6 restrictions. To establish a *prima facie* case of disability  
7 discrimination, Brown had to show that: (1) she is disabled;  
8 (2) she is "otherwise qualified" for the position, with or  
9 without a reasonable accommodation; and (3) she suffered an  
10 adverse employment action because of her disability. Zukle,  
11 166 F.3d at 1045. If she established her *prima facie* case,  
12 the burden would then shift to the Postal Service to offer a  
13 legitimate, non-discriminatory reason for the adverse  
14 action. If the Postal Service proffered such a reason, the  
15 burden would shift back to Brown to show that the Postal  
16 Service's reason is actually a pretext for discrimination.  
17 Lucero v. Hart, 915 F.2d 1367, 1371 (9<sup>th</sup> Cir. 1990)  
18 (citation omitted).

19 32. Brown has presented no evidence satisfying the first two  
20 elements of her *prima facie* case. But even if she had, she  
21 has presented no evidence that she received inferior  
22 treatment to non-disabled employees *because of* her physical  
23 restrictions. Indeed, her disparate treatment claim appears  
24 to rest almost entirely on the hearsay statements allegedly  
25 made by Postmaster Puskas in the presence of two union  
26 workers. These statements do not constitute, as Brown  
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1 argues, direct evidence of discrimination -- not on the  
2 record before the Court. This is because there is no  
3 evidence that any Postal manager, including Postmaster  
4 Puskas, took any adverse action against Brown consistent  
5 with those negative feelings.

6 33. In fact, viewed in the light most favorable to Brown,  
7 therefore, Postmaster Puskas's were not expressed through  
8 his actions or anyone else's; the undisputed facts show that  
9 the Postal managers tried diligently to work with Brown, in  
10 spite of any resentments the Postmaster may have harbored.

11 34. As for Brown's circumstantial evidence, she is missing a  
12 *prima facie* case. Not only has she failed to identify a  
13 single similarly situated non-disabled employee who was  
14 treated better than she under comparable circumstances, but  
15 she has failed to identify any adverse actions taken against  
16 her during the period of her active employment.

17 35. Brown appears to have abandoned the argument that requiring  
18 the voice recognition workers to work on Christmas and New  
19 Year's Eve constituted discrimination. To the extent that  
20 she has not abandoned that claim, however, the EEO Affidavit  
21 of Margaret Tippie amply sets forth Defendant's legitimate,  
22 non-discrimination reason, which Brown has not proffered any  
23 evidence disproving.

24 36. Brown was not demoted or fired, which the Postal Service  
25 could have done without violating the Rehab. Act; instead,  
26 the terms or conditions of her position were modified per  
27

1 her physician's instructions in order to accommodate her  
2 physical limitations. Cf. Yartzoff v. Thomas, 809 F.2d  
3 1371, 1376 (9<sup>th</sup> Cir. 1987) (holding that transfer of job  
4 duties and undeserved performance ratings could constitutes  
5 adverse actions), *cert. denied*, 498 U.S. 939 (1990).

6 37. It is true that Brown is no longer on the active rolls.  
7 However, she was placed in her current inactive status,  
8 because, after four years of exploring options, the Postal  
9 Service could not find her another suitable permanent  
10 placement. (Solis Supp. Dec. ¶ 2, filed concurrently  
11 herewith.)

12 38. Brown claims that she need not present evidence of pretext  
13 on this issue because Defendant failed to address her  
14 inactive status in his moving papers. Brown's Second  
15 Amended Complaint does not, however, set forth a  
16 constructive discharge claim; nor can it liberally be  
17 construed as claiming that her present employment status  
18 constitutes an adverse action.

19 39. Brown's race/national origion and gender claims are equally  
20 unsustainable. A Title VII plaintiff may establish a prima  
21 facie case of disparate treatment based on race/national  
22 origin or gender by showing that: (1) she belongs to a  
23 protected class; (2) she was qualified for the position; (3)  
24 she was subjected to an adverse employment action; and (4)  
25 similarly situated individuals outside of her protected  
26 class were treated more favorably. Aragon v. Republic  
27

1        Silver State Disposal, Inc., 292 F.3d 654, 658 (9th Cir.  
2        2002) (citation omitted). If she is able to do so, the  
3        burden of production shifts to the defendant to articulate a  
4        legitimate, nondiscriminatory reason for its action. Id.  
5        The plaintiff must then demonstrate that the defendant's  
6        articulated reason is mere pretext for unlawful  
7        discrimination. The plaintiff may do this by "either  
8        directly persuading the court that a discriminatory reason  
9        more likely motivated the employer or indirectly by showing  
10       that the employer's proffered explanation is unworthy of  
11       credence.'" Id. at 659, quoting Chuang v. Univ. of Cal.  
12       Davis, 225 F.3d 1115, 1124 (9th Cir. 2000).

13    40. Brown has presented no evidence that management treated  
14       persons outside her race better than it treated Brown. Nor  
15       has she presented any evidence that her gender played a role  
16       in any of management's actions towards her.

17    41. To survive summary judgment on any of her harassment claims,  
18       Brown had to show that: (1) she was subjected to verbal or  
19       physical conduct because of her race, color, gender or  
20       disability; (2) the conduct was unwelcome; and (3) the  
21       conduct was sufficiently severe or pervasive to alter the  
22       conditions of her employment and create an abusive work  
23       environment. Kang v. U. Lim America, Inc., 296 F.3d 810,  
24       817 (9<sup>th</sup> Cir. 2002) (national origin case); Rene v. MGM  
25       Grand Hotel, Inc., 305 F.3d 1061, 1066 (9<sup>th</sup> Cir. 2002),  
26       *cert. denied*, 538 U.S. 922 (2003) (gender case). Moreover,  
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1 an actionable hostile work environment "must both  
2 subjectively and objectively be perceived as abusive."  
3 Brooks v. City of San Mateo, 229 F.3d 917, 923 (9<sup>th</sup> Cir.  
4 2000) (quoting Harris v. Forklift Sys., Inc., 510 U.S. at  
5 22-23, 114 S.Ct. 367 (1993)).

6 42. Brown presented no evidence that she was abused by  
7 management. She demanded accommodations and was given those  
8 that were reasonable. She took multiple extended leaves of  
9 absence, and she returned with demands so restricting that  
10 it was clear that the time off had not been used  
11 productively. She presented no evidence that she was forced  
12 to lift heavy packages. She presented no evidence that she  
13 was denied breaks when she needed them.

14 43. The only admissible evidence presented to this Court shows  
15 that she was given work that she said she could handle, but  
16 there simply wasn't a sufficient amount of such light-duty  
17 mail handling to occupy a full day. When her conditions  
18 deteriorated at Bellflower, she was transferred to Santa Ana  
19 so that she wouldn't have to use her hands at all. Later in  
20 her employment, management was reluctant to give her work  
21 she claimed she could do given her own doctor's onerous  
22 restrictions. Brown felt she was being forced out, but none  
23 of her requested accommodations were rejected outright.

24 44. Brown's retaliation claim must also be dismissed, as a  
25 matter of law. To state a prima facie case of retaliation,  
26 the plaintiff must show (1) that she engaged in a protected  
27

1 activity; (2) she thereafter received adverse treatment from  
2 her employer; and (3) that there was a causal connection  
3 between the protected activity and the adverse treatment.

4 Wrighten v. Metro. Hospitals, Inc., 726 F.2d 1346, 1354 (9th  
5 Cir. 1984). Typically, causation may be inferred if two  
6 circumstantial factors exist: temporal proximity between the  
7 protected activity and the alleged retaliatory decision, and  
8 the employer's knowledge of plaintiff's participation in  
9 that activity. Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th  
10 Cir. 1987), *cert. denied*, 498 U.S. 939 (1990).

11 45. Once the plaintiff states a prima facie case, the burden  
12 shifts to the employer to articulate some legitimate, non-  
13 retaliatory reason for the adverse action. If the employer  
14 is successful, the employee must then show that a  
15 retaliatory intent motivated the employer's action, which  
16 may be accomplished (1) indirectly by showing that the  
17 employer's proffered explanation was a pretext, or (2)  
18 directly by showing that a discriminatory reason more likely  
19 motivated the employer's action. Wrighten, 726 F.2d at  
20 1354. "The ultimate burden of persuading the court that the  
21 defendant unlawfully retaliated against [him] remains at all  
22 times with the plaintiff." Cohen v. Fred Mayer, Inc., 686  
23 F.2d 793, 796-97 (9th Cir. 1982).

24 46. Brown has presented no evidence that management took an  
25 adverse action against Brown, let alone one that was in any  
26 way causally related to her EEO activity. The undisputed  
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1 facts shows that management asked her what accommodations  
2 she needed and endeavored to provide them. Because she did  
3 not get everything she demanded, Brown left work for months  
4 at a time and then returned with additional demands, the  
5 last of which were so onerous that even trying to meet them  
6 would have been futile. At some point, the onus shifted to  
7 Brown to find a way, through her physical limitations, to  
8 become once again a productive Postal worker. She refused.

9 47. In summary, the Court concludes that the Postal Service gave  
10 Brown a multitude of reasonable accommodations throughout  
11 her employment and treated her no differently from similarly  
12 situated male employees, employees without disabilities, or  
13 employees of different races and colors.

14 48. The Court further concludes that, in light of the undisputed  
15 evidence that the Postal managers fully respected their  
16 legal obligations under the Rehab. Act, the isolated  
17 statements attributed to the Bellflower Postmaster  
18 purportedly indicating his initial displeasure with having  
19 an injured worker on staff do not render Brown's otherwise  
20 unsupported and unsupportable claims trial-worthy.

21 Accordingly, the Postal Service is entitled to summary  
22 judgment, under Celotex Corp. v. Catrett, 477 U.S. 317, 323,  
23 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).


24 Based on the Court's Conclusions of Law, the Court hereby  
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1 grants Defendant's motion for summary judgment in its entirety.  
2 This action is hereby dismissed in its entirety with prejudice.

3 The facts found herein have been reviewed and  
4 are supported by evidence (R).

5 IT IS SO ORDERED.

6  
7 DATED: \_December 8, 2009

  
\_\_\_\_\_  
8 THE HONORABLE MANUEL L. REAL  
9 UNITED STATES DISTRICT JUDGE

10 Presented by:

11 GEORGE S. CARDONA  
12 Acting United States Attorney  
13 LEON W. WEIDMAN  
14 Assistant United States Attorney  
15 Chief, Civil Division

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/s/  
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